MOTION TO AFFIRM

Pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

This is a direct appeal from a final judgment entered January 2, 1953, by a three-judge district court convened pursuant to 28 U.S.C. 2284 and 2325, which dismissed a complaint seeking to set aside certain orders of the Interstate Commerce Commission. These orders authorized nineteen motor carriers specializing in the hauling of heavy oil field equipment to extend their operations from the Southwest into the Rocky Mountain area. Appellants are four motor carriers whose certificates of public convenience and necessity presently authorize them to transport such equipment to some of the same areas for which the additional carriers have been certificated. This appeal was allowed on February 11, 1953, and the appeal papers were served on appellees on February 13, 1953.

In 1948 a number of motor carriers operating in the Southwest in anticipation of an oil boom in the Rocky Mountain area, filed applications for extension of their certificate authority to haul oil field equipment into that area. Three successive separate hearings were held: a consolidated hearing on twelve applications, another consolidated hearing on six applications, and a separate hearing on a

single application.[1] The examiner before whom these applications were heard had not been appointed pursuant to Section 11 of the Administrative Procedure Act. Appellants participated in the three hearings and opposed the applications, but did not challenge the examiner's qualifications, although they had ample opportunity to do so.

The examiner filed three separate reports, recommending that all the applications be denied. The applicants filed exceptions to these reports and appellants filed replies in which several of them praised the examiner's conduct of the hearings and his evaluation of the evidence.

On June 11, 1951, Division 5 of the Commission rejected the examiner's recommendations, and granted all of the applications. Division 5 held that there was "in immediate prospect" a "large-scale development program" for the Rocky Mountain area, that such development would produce demands for transportation service "of the highly specialized nature here considered" which would "greatly exceed" the capacities of existing facilities, and that accordingly the "present and future public convenience and necessity" required the proposed increased operations. Division 5 issued one consolidated report covering the eighteen applications that had been heard at the two consolidated hearings, and another report covering the single application that had been heard separately.

Appellants filed motions with the Commission

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[1] The hearings were held between April 1949 and June 1949 in Dallas and Houston, Texas, and in Denver, Colorado.

for rehearing and reconsideration. In these motions they raised, for the first time in the proceedings, the objection that the examiner had not been appointed pursuant to Section 11 of the Administrative Procedure Act. On May 7, 1952, the Commission unanimously denied the motions.

Appellants then filed the instant suit in the district court to set aside the Commission's orders. After hearing argument the district court (Hutchinson, Circuit Judge, and Atwell and Davidson, District Judges) unanimously affirmed the Commission's orders. 108 F. Supp. 928.

Appellants' principal contention is that their objection that the examiner had not been appointed pursuant to the Administrative Procedure Act, was seasonably made in their petition for rehearing. We believe, however, that the decision of the Court in *United States* v. *Tucker Truck Lines*, 344 U. S. 33, requires rejection of this contention. Although the precise issue was not specifically decided in the *Tucker* case, we submit that the Court's opinion indicates that in proceedings before the Interstate Commerce Commission objection to the examiner's qualification must be made during the course of the hearings.

In the *Tucker* case the Court held that an objection to the qualifications of an examiner came too late when made for the first time in the district court. The Court held that since the Commission's failure to appoint a qualified examiner was not a jurisdictional defect, the Commission's order was not to be set aside unless a "timely objection" had

been made. P. 38. The Court's opinion indicates that by "timely objection" it meant one "made at the time appropriate under its [the agency's] practice," and that under the "established practice" of the Interstate Commerce Commission such an objection was not timely unless made "before the examiner." P. 37.[2] The Court stated that a defect in the examiner's appointment was an "irregularity" which would invalidate a resulting Commission order if the Commission had overruled an appropriate objection "*made during the hearings*" (P. 38; emphasis added). The Court further pointed out, in distinguishing *Riss & Co.* v. *United States*, 341 U. S. 907, that in the *Riss* case the examiner's qualifications had been challenged "*as it should have been*, before the examiner at the hearings * * *" (P. 36; emphasis added).

The rationale of the *Tucker* case is equally applicable to the case at bar. There is no suggestion here that the examiner exhibited "bias, favoritism or unfairness" (P. 35); on the contrary, he decided in appellants' favor, and they subsequently praised his conduct of the proceedings. Nor did the Commission or the examiner occupy an adversary role in the proceedings; their sole function was "to decide justly between contestants in an adversary proceeding" (P. 36). Clearly, the objection to the examiner's qualifications in the instant case was "an afterthought, brought forward

[2] The Court noted that it was the Commissioner's "policy" to refuse rehearings in cases where the objection had not been made before the examiner. P. 37, note 7.

at the last possible moment to undo the administrative proceedings without consideration of the merits," which could "prevail only from technical compulsion irrespective of considerations of practical justice." *Ibid.*[3]

We submit that by its decision in the *Tucker* case this Court plainly intended to bar judicial consideration of objections to the qualifications of hearing examiners unless they had been made during the course of the hearings.

Appellants also argue that the Commission erred in (1) consolidating the applications for hearing, and (2) issuing a single report covering all the applications thus consolidated. Neither contention is sound. The power of administrative agencies to consolidate for hearing cases which involve a common subject matter is well settled. Cf. *Civil Aeronautics Board* v. *State Airlines*, 338 U. S. 572, 576-577, where the Court approved the consolidation of 45 route applications filed by 25 airlines into a single area proceeding. Since all of the applications in the instant case involved the extension of existing operating authority into the same area, consolidation clearly was appropriate. Cf. *American Trucking Associations* v. *United States*, 326 U. S. 77, 83. Similarly, it was within the Commission's discretion to dispose of the consolidated applications in a single report. Since the applications were all "closely related" and appellants par-

[3] Appellants do not "claim to have been mislead or in any way hampered in ascertaining the facts about the examiner's appointment." P. 35.

ticipated in both of the consolidated hearings, appellants cannot complain that the Commission "chose to write one report rather than two" or eighteen. *United States* v. *Pierce Auto Lines*, 327 U. S. 515, 523.

Appellants' other arguments are likewise without merit. They urge that the examiner erred in admitting into evidence excerpts from the *Oil and Gas Journal* dealing with prospective oil production in the Rocky Mountain area. As the Commission's report makes clear, however, little weight was given to this evidence. Appellants also contend that a rehearing should have been granted because the record before the Commission was stale. As this Court has repeatedly recognized, however, the grant or denial of a rehearing for that reason is within the Commission's discretion. *Interstate Commerce Commission* v. *Jersey City*, 322 U. S. 503, 515-518, and cases there cited; *United States* v. *Pierce Auto Freight Lines*, *supra*.

Finally, appellants challenge the Commission's finding that the public convenience and necessity would be served by granting the applications and permitting the service to be inaugurated forthwith, instead of "waiting until the transportation situation becomes critical before authorizing additional service." Section 207 of the Act, however, authorizes the granting of certificates if required "by the present or *future*" public convenience and necessity (emphasis added). The determination of whether "additional motor carrier service would serve public convenience and necessity," and

whether "the public interest requires that future shipping needs be assured rather than left uncertain," are matters peculiarly within the Commission's expert discretion. *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 65; *United States* v. *Detroit Navigation Co.*, 326 U.S. 236, 241. And, in exercising that discretion, the Commission is required to make forecasts as to future transportation requirements. *United States* v. *Detroit Navigation Co., supra.* The district court found, after a careful review of the Commission's detailed report and the extensive record, that there was "ample testimony" to support the Commission's findings. This conclusion is, we submit, plainly correct. Appellants' attack on the Commission's finding of public convenience and necessity presents no question warranting further review by this Court.

CONCLUSION

For the foregoing reasons, we submit that this appeal presents no substantial question. The judgment of the district court should accordingly be affirmed.

Respectfully submitted,

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